Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

FRANKLIN PAREDES-RAVELO,
Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was petitioner entitled to a Certificate of Appealability pursuant to 28 U.S.C. §2253 (c) (2) where the district court failed to apply a post-sentencing clarifying amendment to §1B1.3 of the Sentencing Guidelines, and is such a failure a complete miscarriage of justice.

PARTIES TO THE PROCEEDING

The parties to the proceedings are those named in the caption and Miguel D. Liriano, who was a co-defendant of the petitioner-appellant on trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANKLIN PAREDES-RAVELO,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Franklin Peredes-Ravelo petitions for a Writ of Certiorari to review an order of the United States Court of Appeals for the Second Circuit denying his application for a certificate of appealability.

CITATION TO OPINION BELOW

The order of the Court of Appeals appears in the Appendix hereto. The opinion of the district court denying petitioner's motion pursuant to 28 U.S.C. §2255 also appears in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals was entered on March 11, 1999. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The testimony at trial established that prior to October 21, 1991, Nelson Almonte, a confidential informant working under the direction of the DEA, had negotiated on behalf of the undercover agent, Special Agent Lius Pizarro (the "U/C"), for the U/C to purchase ten kilograms of cocaine from Miguel Liriano at a price of $18,500 per kilogram.

On October 21, 1991, Agent Pizarro met with Liriano at the back office of St. Michael's Variety Store, located at 1258 St. Nicholas Avenue. Liriano confirmed that the price was still $ 18,500 per kilogram, but told Agent Pizzaro that there were only three kilograms immediately available. Liriano further explained that the other seven kilograms could be obtained by that evening from either of two sources. Liriano and Agent Pizarro agreed that the transaction would proceed later that day at the variety store.

During the conversation, petitioner entered the room where Pizarro and Liriano were. After petitioner entered the room, the conversation about the ten kilogram transaction continued, with Liriano and petitioner discussing with Agent Pizarro the additional cost of having additional quantities of cocaine transported to Virginia. Liriano then handed petitioner a key, and told him to go retrieve the cocaine, and meet him at an apartment in the vicinity of 150th Street and Broadway. Liriano told Agent Pizarro to come back to the store in twenty-five to thirty minutes.

Special Agents of the DEA followed petitioner and saw him enter a building at 3333 Broadway, located in the vicinity of 135th Street and Broadway, carrying an empty brown paper bag. Approximately fifteen minutes later, petitioner exited the building carrying the same bag, but now the bag appeared to be full. Petitioner then met Liriano at the apartment building on 150th Street and Broadway, and Liriano handed petitioner another set of keys. Petitioner went into the building, and then came out carrying the same bag. Both Liriano and Petitioner then entered their cars and drove back to the variety store. Agent Pizarro returned to the store to conclude the transaction, and after he verified that the contents of the bag were three kilograms of cocaine, petitioner and Liriano were arrested.

THE SENTENCE PROCEEDING

On September 25, 1992, petitioner was sentenced by the district court to thirteen years imprisonment. Petitioner's counsel argued that petitioner should only be sentenced based on the possession of three kilograms, and that he was entitled to a minor participant reduction. Despite such arguments, the district court sentenced petitioner based on his conviction of conspiring to sell ten kilograms of cocaine, which had a base level of 32, carrying a minimum sentence of ten years. The district court also imposed a two-point sentence enhancement because of the guns recovered from the apartment at 3333 Broadway. The district court declined to grant any reduction for petitioner's alleged minor participation in the transaction.

Petitioner filed a timely appeal to the United States Court of Appeals for the Second Circuit, challenging his sentence. The Second Circuit affirmed petitioner's sentence.

THE §2255 MOTION

Petitioner, *pro se*, based his §225 motion, in part, on the allegation that his counsel was ineffective for failing to challenge the Probation Department's determination of the quantity of narcotics involved in the case. Specifically, petitioner argued that he should be sentenced based only on a transaction involving three, not ten, kilograms of cocaine. The district court rejected these arguments and denied a certificate of appealability. The Court of Appeals also denied a certificate of appealability.

REASONS FOR GRANTING THE WRIT

1. The decision below raises a significant question: whether it is a complete miscarriage of justice for a district court to fail to apply post-sentencing clarifying amendment to the Sentencing Guidelines.

The relevant conduct guideline, §1B1.3, and its commentary and examples were substantially revised, effective November 1, 1992, approximately two months after petitioner was sentenced. Application Note 2 makes clear that in the case of jointly undertaken criminal activity, a defendant is responsible for the conduct of others only it "was both: (I) in furtherance of the jointly undertaken criminal activity; and (ii) reasonable foreseeable in connection with that activity." Note 1 adds that "[t]he principles and limits of sentencing accountability are not always the same as the principles and limits of criminal liability." Thus, a sentencing court must first determine the scope of each defendant's agreement with others,

and the determine whether drugs attributed to others were reasonably foreseeable to that defendant within the scope of the agreement. See also *United States v. Weekly*, 118 F.3d 576, 578 (8th Cir. 1997)("Relevant to the determination of reasonable foreseeability is whether the defendant demonstrated a substantial level of commitment to the conspiracy.")

Some Courts had previously held that knowledge or foreseeability alone were enough, but now require reasonable foreseeability within the scope of the jointly undertaken criminal activity. See, e.g., *United States v. Calrera-Baez*, 24 F3d 283, 288 (D.C. Cir. 1994)("mere foreseeability is not enough: someone wh belongs to a drug conspiracy may well be able to foresee that his co-venturers, in addition to acting in furtherance of his agreement with them, will be conducting drug transactions of their own on the side, but he is not automatically accountable for all of those side deals"); *United States v. Jenkins*, 4 F.3d 1338, 13146-47 (6th Cir. 1993)("to charge one participant in a conspiracy with the conduct of the other participants" requires a finding of foreseeability and conduct in furtherance of jointly undertaken criminal activity); *United States v. Irvin*, 2 F.3d 72, 75-78 (4th Cir. 1993) (in a drug conspiracy, "determine the quantity of narcotics reasonably foreseeable to each coconspirator within the scope of his agreement"); *United States v. Maserati,* 1 F.3d 330, 340 (5th Cir. 1993) ("Application Note 2 makes clear that criminal liability and relevant conduct are two different concepts, regardless of whether the indictment includes a conspiracy allegation"; *United States v. Garrido,* 995 F.2d 808, 813 (8th Cir. 1993) (simple knowledge that coconspirator possessed other drugs not enough – must show that those amounts were reasonably foreseeable and in furtherance of agreement); *United States v. Ismond,* 993 F.2d 1498, 1499 (11th Cir. 1993) ("to determine a defendant's liability for the acts of others, the

district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant.... Once the extent of a defendant's participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation").

Generally, the circuits have stressed the need for specific findings on the quantity of drugs that were reasonably foreseeable to each defendant. See *United States v. Anderson*, 39 F.3d 331, 353 (D.C. Cir 1994) (remanded for " specific, individualized findings regarding the quantity of drugs each appellant might have reasonably foreseen his or her agreed-upon participation would involve") *vacated in part on other grounds*, 59 F.3d 1323 (D.C. Cir. 1995) (en banc): *United States v. Rogers*, 982 F.2d 1241, 1246 (8th Cir. 1993) (remanded: finding that "by virtue of the conspiracy conviction" LSD sales attributed to codefendant are also attributable to defendant was insufficient statement of reasons). Here, the district court failed to make any specific findings on the quantity of drugs and also failed to apply the revised sentencing guidelines. A certificate of appealability should have been granted because the district court's errors constituted a fundamental defect which resulted in a complete miscarriage of justice: i.e., a prison sentence greater than required by the guidelines.

CONCLUSION

For these reasons, a Writ of Certiorari, should issue to review the Order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the eleventh day of March one thousand nine hundred and ninety-nine,

Present:

Hon. Joseph M. McLaughlin,
Hon. Chester J. Straub,
Hon. Damon J. Keith,
Circuit Judges.

Franklin Paredes-Ravelo,
Petitioner-Appellant,

v.

98-2395

United States of America,
Respondent-Appellee.

A motion having been made herein by appellant *pro se* for

certificate of appealability, upon consideration thereof, it is ordered that said motion be and it hereby is denied and the appeal is dismissed. The appellant has failed to make a "substantial showing of the denial of constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By:s/_____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANKLIN PAREDES-RAVELO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ORDER AND OPINION
96 CIV. 3680 (JFK)

APPEARANCES:

For Petitioner:

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JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Before the court is Petitioner's, Franklin Paredes-Ravelo, motion to vacate his conviction, dismiss the indictment against him, and correct his sentence, pursuant to 28 U.S.C. § 2255. For the reasons below, Petitioner's motion is denied.

BACKGROUND

Petitioner and his co-counsel, Miguel Liriano, were arrested on October 21, 1991 for conspiring to distribute and possess with the intent to distribute ten kilograms of cocaine. They were arrested with three of the planned ten kilograms in their possession. A search of the apartment used in connection with this drug dealing revealed an additional 750 grams of cocaine, approximately $17, 500 in cash, assorted drug paraphernalia, and three weapons.

Prior to October 21, 1991, Liriano had negotiating with Nelson Almonte, a confidential informant working for the Drug Enforcement Agency ("DEA"), for the sale of ten kilograms. Liriano was going to sell the cocaine to DEA Special Agent Luis Pizarro, who was working undercover, at a price of $18, 500 per kilogram. On October 21, 1991, Liriano met Pizarro at a variety store located 1253 St. Nicholas Avenue, and informed Pizarro that only three of the ten kilograms were immediately available. Liriano and Pizarro agreed that the transaction would proceed later that day. During the conversation, Petitioner entered the room where Pizarro and Liriano were. After

Petitioner entered the room, the conversation about the ten kilogram transaction continued, with Liriano and petitioner discussing with agent Pizarro the additional cost of having additional quantities of cocaine transported to Virginia.

Liriano then handed Petitioner a key, and told him to go retrieve the cocaine, and met him at an apartment in the vicinity of 150th Street and Broadway. Liriano told Agent Pizarro to come back to the store in twenty-five to thirty minutes.

Special Agents of the DEA followed Petitioner and witnessed him enter a building at 3333 Broadway, located in the vicinity of 135th Street and Broadway, carrying an empty brown paper bag. Approximately fifteen minutes later, Petitioner exited the building carrying the same bag, but now the bag appeared to be full. Petitioner then met Liriano at the apartment building on 150th Street and Broadway, and Liriano handed Petitioner another set of keys. Petitioner went into the building, and came out carrying the same bag. Both Liriano and Petitioner then entered their cars and drove back to the variety store. Agent Pizarro returned to the store to conclude the transaction, and after he verified that the contents of the bag were three kilograms of cocaine, Petitioner and Liriano were arrested. Later that evening, the DEA executed a legal search of the apartment at 3333 Broadway, and seized the above-mentioned items.

At trial, the Government proved its case by relying on the seized physical evidence, and the testimony of Agent Pizarro and the other agents involved in the arrest of Petitioner and Liriano. Almonte, the confidential informer, did not testify because he had left the country. Petitioner called no witnesses in his defense, instead choosing to rely on a "lack of Knowledge" defense. Liriano tried to establish an entrapment defense.

Petitioner and Liriano were found guilty as to both the

conspiracy to sell ten kilograms and the possession of three kilograms counts on June 24, 1992. On September 25, 1992, Petitioner was sentenced by the Court to thirteen years imprisonment. Petitioner's counsel argued that Petitioner should only be sentenced based on the possession of the three kilograms, and that he was entitled to a minor participant reduction. Despite such arguments, the Court sentenced Petitioner based on his conviction of conspiring to sell ten kilograms of cocaine, which had a base offense level of 32, carrying a minimum sentence of ten years. The Court also imposed a two-point sentence enhancement because of the guns recovered from the apartment a 3333 Broadway. The Court declined to grant any reduction for Petitioner's alleged minor participation in the transaction.

Petitioner filed a timely appeal to the United States Court of Appeals for the Second Circuit, challenging his sentence. The Second Circuit affirmed Petitioner's sentence.

On May 17, 1996, Petitioner brought the instant motion.

DISCUSSION

Petitioner bases his § 2255 motion on the allegations that his counsel, who represented Petitioner at both trial and sentencing, was ineffective. Petitioner makes three arguments to support his ineffective assistance of counsel claim: (1) counsel failed to insist that the Government produce the confidential informer at trial, thereby destroying any chance of entrapment defense; (2) counsel failed at sentencing proceeding to argue for a downward adjustment based on Petitioner's minor role in the transaction; and (3) counsel failed to challenge the Probation Department's determination of the quantity of narcotics involved in the offense.

A. Statute of Limitations

On April 24, 1996, Congress signed into law the Antiterrorism and Effective Death Penalty act of 1996 (AEDPA"), Pub. L. No. 10432, 100 Stat. 1214. Section 105 of the AEDPA imposed a one year statute of limitations on motions brought pursuant to § 2255. The statute of limitations applies to motions filed after April 24, 1996, *see Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 2063 (1997), but if the final judgment in the underlying criminal case occurred before April 24, 1996, an inmate has a "reasonable time" from the effective date of the AEDPA to file his motion in federal court. *See Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997). In *Lindh*, before the Supreme Court's ruling, the Seventh Circuit held that a "reasonale time" was one year from the effective date of the AEDPA. *See Lindh*, 96 F.3d 856, 866 (7th Cir. 1996 (en banc), *rev'd on other grounds*, ____ U.S. ___, 117 S. Ct. 2059 (1997). The *Peterson* case does not define a "reasonable," but states that where a prisoner has had "several years to contemplate bringing a federal habeas corpus motion," there is no need to accord a full year in which to bring a habeas petition. *Peterson*, 107 F.3d at 93.

In the instant case, Petitioner filed the § 2255 motion 23 days after the AEDPA's effective date. The Court finds that Petitioner's filling of the instant § 2255 petition 23 days after the effective date of the AEDPA is a reasonable time under the AEDPA. Petitioner's § 2255 motion is not time-barred.

B. Legal Standards

To prevail on a claim of ineffective assistance of counsel claim, a defendant must: (10) overcome a strong presumption that counsel's conduct was reasonable by showing that counsel's

performance fell below "an objective standard of reasonableness based on prevailing professional norms; and (2) establish prejudice by demonstrating that "but for counsel's unprofessional errors, the result of the proceeding would have been different."*Strickland v. Washington*, 466 U.S. 668, 687-88, 693-94 (1984) . Only if both of these elements are satisfied can it be concluded that " counsel was not functioning as the 'counsel' guarenteed by the Sixth Amendment." *Id.* At 687.

In determining whether counsel's performance was unprofessional and unreasonable, a court must keep in mind the strong presumption favoring the reasonableness of counsel's decisions. A defendant cannot prevail on a claim of ineffective assistance of counsel merely because he believes that counsel's trial strategy was inadequate, *United States v. Sanchez*, 790 F.2d 555, 560 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986) , and a conviction will not be overturned when counsel provided " reasonably effective assistance" to the defendant. *Strickland*, 466 U.S. at 687. Moreover, actions or omissions by counsel that might be considered strategic decisions do not constitute ineffective assistance so long as they are reasonable. *See, e.g., United States v. Vegas*, 27 F. 3d at 773, 777 (2d Cir. 1994) . In assessing an attorney's performance, a court must judge the performance as of the time of counsel's conduct, and may not use hindsight to second-guess the attorney's strategy choices. *See Mayo v. Henderson*, 13 F. 3d 528, 533 (2d Cir. 1994) .

If a court determines that an attorney's performance was objectively unreasonable, it must then determine whether, "absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* At 533. A reasonable probability is a " probability sufficient to undermine confidence in the outcome." *Id.*

With respect to this "prejudice" prong of the *Strickland* test, the Supreme Court has noted that " [I] f it is easier to dispose

of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." *Strickland*, 466 U.S. at 697.

C. The Entrapment Defense Claim

Petitioner argues that any chance of an entrapment defense at trial was severely hampered by his council's failure to insist that the Government produce its confidential informer at trial. Petitioner argues that without the confidential informer's testimony, there was no possibility of succeeding on an entrapment defense. Petitioner, however, overlooks the fact that he never advanced an entrapment defense because he never had any direct contact with the confidential informer, and his only connection to the transaction was on the day of the arrest. Thus, counsel's failure to insist that the confidential informer testify at trial was not unreasonable because the informer's testimony was irrelevant to any defense available to Petitioner.

Even assuming that an entrapment defense was available to Petitioner, Petitioner cannot challenge counsel's choice to assert a "lack of knowledge" defense instead of an entrapment defense. Given the facts of the instant case, at the time of Petitioner's trial, counsel's choice to assert a "lack of knowledge" defense instead of an entrapment defense was a reasonable strategic trial decision. As stated above, such a decision does not constitute ineffective assistance of counsel.

D. The sentencing Errors Claims

Petitioner argues that his counsel's performance was ineffective because at the sentencing proceeding, he failed to argue that Petitioner: (1) should be sentenced based only on a transaction involving three, not ten, kilograms of cocaine: and (2) was entitled to a minor or minimal role reduction in his sentence. A reading of the sentencing transcript reveals that Petitioner's counsel challenged both the quantity of narcotics involved and Petitioner's role in the transaction, and the Court rejected them. *See United*

States v. Liriano and Paredes Ravelo, 91 CR. 908 (JFK) , Sep. 15, 1992, Tr. At 21- 27. Accordingly, these claims for relief are denied.

E. Certificate of Appealability

As Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; *see generally Lozada v. United States*, 107 F.3d 1011(2d Cir. 1997). The Court certifies pursuant to 28 U.S.C. §1915 (a) (3) that any appeal from this order would not be taken is good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962) .

CONCLUSION

Based on the above, Petition CPLR § 2255 motionis dismissed. The Court orders this case closed, and directs the Clerk of the Court to remove it from the Court's active docket.

SO ORDERED .

Dated : New York, New York
February 18, 1998

s/_____
JOHN F. KEENAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
FRANKLIN PAREDES-RAVELO,

Petitioner,

-against-

MEMORANDUM ORDER
AND OPINION
96 CIV. 3680 (JFK)

UNITED STATES OF AMERICA,

Respondent.
----------X

JOHN F. KEENAN, United States District Judge:

Before the Court is Petitioner's motion for reconsideration of the Court's denial on February 18, 1998 of the Petitioner's 28 U.S.C. § 2255 motion. Although Petitioner does not invoke Fed. R. Civ. P. 59 (e) and has exceeded the ten day limit for filing a reconsideration motion, the Court will analyze this motion under the standards set forth in Rule 59.

The standards controlling a motion for reconsideration are set forth in Local Civil Rule 6.3 and fed. R. Civ. P. 59 (e). Reargument is appropriate only where the court has "overlooked controlling decisions or factual matters put before it on the underlying motion," *In re New York Asbestos Litigation,* 847 F. Supp. 1086, 1141 (S.D.N.Y. 1994), and which, had they been considered, " might reasonably have altered the result reached by the court." *Consolidated Gold Fields v. Angelo American Corp.,* 713 F. Supp. 1457, 1476 (S.D.N.Y 1989); *see Morser v. AT&T Information Sys.,* 715 F. Supp. 516, 517 (S.D.N.Y. 1989). Rule 6.3 " precludes a party from advancing new facts, issues or arguments not previously presented to the court, " *Bank Leumi Trust Co. of*

New York v. Istim, Inc. , 902 F. Supp. 46, 48 (S.D.N.Y 1995), and Rule 6.3 is to be " narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been fully considered by the court." *Anglo Americam Ins. Group v. Calfed Inc., XCF* , 940 F. Supp. 554. 557 (S.D.N.Y. 1996). The purpose of Rule 6.3 is to " enure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Carolco Pictures, Inc. v. Sirota,* 700 F. Supp. 169, 170 (S.D. N.Y. 1998). Additionally, a Rule 6.3 motion " is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." *In re Houbigat, Inc.,* 914 F. Supp. 997, 1001 (S.D.N.Y 1996).

The Court has carefully reviewed Plaintiffs' papers on these motions to reconsider, as well as all of the papers submitted on the underlying § 255 motion. The Court concludes that Petitioner only rehashes arguments and issues already considered and decided by the Court. The motion is therefore denied.

SO ORDERED .

Dated : New York, New York
April, 17, 1998

s/_____
JOHN F. KEENAN
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TO : CLERK'S OFFICE DATE: 4-17-98

FROM: JUDGE JOHN F. KEENAN

SUBJECT: REMOVAL OF MOTIONS FROM DOCKET

96 civ. 3680 (JFK)

Franklin Paredes - Ravelo

vs.

U.S.A.

The attached opinion and order dated April 17, 1998
decides 1 motion(s) filed in this case on March 30, 1998
Please remove the listing(s) for the motion(s) from the docket.